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IN THE
**Supreme Court of the United States**
OCTOBER TERM, 1996

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**INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, AND ROBERT STEIN,**
***Petitioners,***

v.

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCT, INC.,**
***Respondents.***

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**Petition for Writ of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

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# BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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# BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 33 million persons age 50 or older that is dedicated to addressing the needs and interests of older Americans. Approximately thirteen million of AARP's members are under age sixty-five. They are generally not eligible for Medicare and, therefore, rely on employer-funded health benefits. Since the day that AARP was founded in 1958,

access to health care has been a major association priority. One method to increase access to health care is to increase the availability, security, equity, and adequacy of employer-funded welfare plans.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of approximately 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace.

AARP and NELA are qualified to brief the Court on the implications of the decision in this case, having participated as *amicus curiae* in numerous cases involving the Employee Retirement Income Security Act (ERISA), including *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members, NELA members' clients and other participants in employee benefit plans rely on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* Thus, ERISA's protections, and the ability to enforce those protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily upon the security and amount of their employee benefits. In particular, they depend on ERISA's protections against an employer's intentional actions designed to deprive them of those benefits.

The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other participants of welfare



plans. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief *amici curiae*.[1/]

## SUMMARY OF ARGUMENT

The plain language of ERISA § 510 protects participants from interference with rights attainable under welfare benefit plans. Congress did not distinguish between pension and welfare plans, vested and non-vested benefits, or present and future benefits in ERISA § 510, although it did in other sections of ERISA. *Russello v. United States*, 464 U.S. 16, 23 (1983). Moreover, the protection of welfare plan rights under § 510 is consistent with ERISA's structure regarding reporting and disclosure, fiduciary responsibilities and preemption of state law claims. Finally, the legislative history of § 510 corroborates this interpretation of the plain language of the statute. The conference report clearly shows that Congress wanted to protect a participant against interference with any current or future rights attainable under any type of employee benefit plan. H. R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5110.

## ARGUMENT

### I. ERISA § 510 PROTECTS PARTICIPANTS FROM INTENTIONAL INTERFERENCE WITH THEIR WELFARE BENEFITS.

The issue before this Court is whether ERISA § 510 protects participants' welfare benefits from discriminatory interference. A first step in statutory analysis is an examination of the statute's plain language. "[A]ny exercise of statutory construction [begins] with the text of

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[1/] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

the provision in question, and move[s] on, as need be, to the structure and purpose of the Act in which it occurs." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671, 1677 (1995); *see, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) ("To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.").

To interpret a statute, one must "`begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (*quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)); *see also Patterson v. Shumate*, 504 U.S. 753, 757 (1992) ("The plain language of . . . ERISA is our determinant."). Even if the statutory language is unambiguous, the context in which the language is used should be scrutinized in order to confirm its true meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context"). As a last step, a review of the legislative history may assist in determining, or corroborating, the meaning of the statutory language. *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, [courts] look first to the statutory language and then to the legislative history if the statutory language is unclear.").



### A. The Plain Language Of ERISA § 510 Protects Participants From Intentional Interference With Rights Attainable Under Welfare Benefit Plans.

#### 1. The plain language of ERISA § 510 does not distinguish between pension and welfare plans.

Section 510 provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140.

By its terms, § 510 prohibits employers from discriminating against employees for the purpose of interfering with benefits to which they are or may become entitled under any type of employee benefit plan. The general "Definitions" section of ERISA makes it quite clear that the term "an employee benefit plan" includes a welfare plan. *See* 29 U.S.C. § 1002(3) ("The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan"). A "welfare plan" is established for the purpose of providing medical, surgical or hospital care. *See* 29 U.S.C. § 1002(1).

If Congress had wanted to protect only pension plans under § 510, it could have easily done so by using the term "employee pension benefit plan" in § 510. Indeed, Congress provided a specific definition of a pension plan in ERISA. *See* 29 U.S.C. § 1002(2). But

Congress chose to use the broader term -- "employee benefit plan" -- in § 510. Quite simply, the words of § 510 do not limit their application to only employee pension plans. *Russello v. United States,* 464 U.S. at 23 ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion . . . .") (internal quotation marks omitted).

**2. The plain language of ERISA § 510 does not distinguish between vested and non-vested benefits.**

Not only is there no distinction between pension and welfare plans in the plain language of § 510, but there is also no distinction between vested and non-vested benefits in the language. *Heath v. Varity*, 71 F.3d 256, 258 (7th Cir. 1995) (holding that termination to prevent attainment of nonvested welfare benefits is actionable under § 510). *Accord, Shahid v. Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (§ 510 "does not limit its application to benefits that will become vested"); *Seaman v. Arvida Realty Sales,* 985 F.2d 543, 546 (11th Cir.), *cert. denied,* 510 U.S. 916 (1993) ("the validity of a § 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge"). Section 510's lack of distinction between vested and non-vested benefits is logical given that pension plans include some vested benefits, while welfare plans generally do not.[2/]

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[2/] Although ERISA does not provide a schedule for vesting welfare benefits, an employer may agree to vest welfare benefits, or waive its ability to terminate or unilaterally amend a plan. *See, e.g., Schonholz v. Long Island Jewish Medical Center,* 87 F.3d 72 (2d Cir.), *cert. denied*, 117 S. Ct. 511 (1996); *Helwig v. Kelsey-Hayes*, 93 F.3d 243 (6th Cir. 1996); *Bidlack v. Wheelabrator*, 993 F.2d 603 (7th Cir.), *cert. denied*, 510 U.S.

(continued...)



*Heath v. Varity, supra.* When Congress meant to apply a particular statutory section only to vested benefits, it did so. *See, e.g.*, ERISA §§ 203 & 205(a), 29 U.S.C. §§ 1053 & 1055(a). If Congress meant to have § 510 apply only to vested benefits, it could have done so. It did not. *Russello v. United States,* 464 U.S. at 23.

Moreover, to only protect vested benefits under § 510 would render it meaningless because by definition vested benefits are already protected. *See* ERISA §§ 3(19) & 203, 29 U.S.C. §§ 1002(19) & 1053. Indeed, if § 510 distinguished between vested and non-vested benefits, ERISA would fail to protect employees who are terminated prior to their pension benefit vesting, thus eviscerating a primary purpose of the statute. 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4872. Since § 510 protects employees non-vested pension benefits, it should also protect an employee from an employer terminating him or her just before hospitalization for an expensive procedure.

**3. The plain language of ERISA § 510 does not distinguish between present and future benefits.**

The scope of § 510 includes not only any right to which a participant is already entitled under a plan, but also any right to which he or she may become entitled under a plan. Thus, Section 510 does not distinguish between present and future benefits. *Ingersoll-Rand v. McClendon,* 498 U.S. at 143; *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992) (§ 510 claim where participant was discharged because his dependent would have costly future medical condition); *Conkwright v. Westinghouse Elec. Corp.,* 933 F.2d 231, 238 (4th Cir. 1991) (§ 510 claim where a participant was

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[2/] (...continued)
909 (1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied,* 510 U.S. 870 (1993)

discharged to prevent the accrual of additional pension benefits); *Kross v. Western Electric Co.*, 701 F.2d 1238, 1241-43 (7th Cir. 1983) (§ 510 claim where an employee was discharged for the purpose of depriving him of continued participation in his employer's medical plan; rejection of argument that once an employee attains a right under a plan, the employee cannot attain any additional rights under that plan). *See also Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 882, 885 (S.D.N.Y. 1990) ("interference with rights arising in the future is no less actionable than interference with present rights"); *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W. D. Mo. 1984) (discharge shortly after diagnosis of multiple sclerosis to prevent attainment of rights under long term disability and health plans).

Petitioners pled that the employers' actions were taken for the purpose of depriving them of their rights under an employee benefit plan, and thus their Complaint must survive a motion to dismiss.[3/]

### B. Section 510's Protection Of Rights Attainable Under Welfare Plans Is Consistent With The Structure of ERISA.

Construing § 510 to protect both welfare and pension plans is consistent with the structure of ERISA. Part 1 of ERISA imposes reporting and disclosure requirements for employee benefit plans. *See* ERISA §§ 101 - 106, 29 U.S.C. §§ 1021 - 1030. Where Congress intended only for employee pension benefit plans to report or disclose, the statute says so. *See, e.g.,* ERISA § 103(d),

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[3/] Because the plain language requires that a claimant is always required to prove the key element to a § 510 claim -- the employer's intent to interfere with the attainment of benefits under a welfare plan as a motivating factor for the discharge -- not every discharge resulting in a loss of benefits raises a § 510 claim. *E.g., Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989) (employee fired because spouse filed an employee benefit claim).



29 U.S.C. § 1023(d) ("With respect to an employee pension benefit plan . . . "an actuarial statement shall be filed); ERISA § 105, 29 U.S.C. § 1025 ("each administrator of an employee pension benefit plan" . . . shall furnish upon a written request an individual benefit statement).

Part IV of ERISA prescribes fiduciary responsibilities toward all employee benefit plans. *See* ERISA §§ 401 - 414, 29 U.S.C. §§ 1101 - 1114. Neither Congress in these sections, nor this Court in its application of these sections has distinguished between types of benefit plans. *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996) (applying § 404 to a welfare plan); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995) (applying § 402 to a welfare plan).

Finally, inclusion of welfare plans under § 510's protections is consistent with the Court's analysis of ERISA's preemption clause in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 138-145 ("without [§ 510], employers would be able to circumvent the provision of promised benefits. We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510"). Thus, excluding interference with welfare plans from § 510's protections would raise serious questions about whether such claims are preempted by ERISA and about the continuing validity of the Court's decision in *Ingersoll-Rand*.

We recognize that there is a tension between ERISA's statutory provisions permitting an employer to modify or amend a plan, and ensuring that an employee receives all the plan's promised benefits. Such tension is not uncommon in legislation for it reflects compromises between competing interests. Indeed, Congress intended to strike a balance between protecting employees and encouraging employers to voluntarily establish employee benefit plans. *See* H. R.. REP. NO. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4678. Thus, flexibility in amending

plans encourages employers to voluntarily establish welfare plans, and to make more generous promises to the advantage of their workers. However, no inference should be drawn from this flexibility that the promises in place are illusory. Indeed, Section 510 helps make these promises credible. *See Heath v. Varity*, 71 F.3d at 258-59; *Seaman v. Arvida Realty Sales*, 985 F.2d at 546.

This interpretation of § 510, combined with cases such as *Curtiss-Wright Corp. v. Schoonejongen*, *supra,* results in ERISA prohibiting employers from terminating employees to avoid paying them benefits, but permitting employers to reduce or terminate non-vested benefits by simply amending plan provisions. *Seaman v. Arvida Realty Sales*, *supra.* The structure of ERISA, as well as its legislative history, supports this result. *Id.; cf. Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) ("our decision results in a distinction between insured and uninsured plans ....").

### C. ERISA's Legislative History Supports § 510's Protection of Rights Attainable Under Welfare Plans.

As part of its carefully integrated regulatory scheme, Congress included various safeguards "to completely secure the rights and expectations brought into being by this landmark reform legislation." S. REP. NO. 127, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4872. Congress heard evidence that some employers used "economic sanctions or violent reprisals" to prevent employees from receiving benefits to which they were entitled. *Id.* Thus, provisions in both the House and the Senate bills made it "unlawful to interfere with the attainment of any rights to which a participant or beneficiary may become entitled . . . ." H. R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. News 5038, 5110.



The conference committee adopted § 510 with little comment, except to make clear that "the participant or beneficiary may bring a civil action against any person who interferes with his rights which are protected under the Act." *Id.* When introducing the conference report in the Senate, Senator Harrison Williams, chairman of the Senate Committee on Labor and Public Welfare, confirmed that the law contained protection against "discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of vested benefits or other rights under the bill . . . ." 120 Cong. Rec. S. 15,737 (Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5177, 5188 (emphasis added).

Although the primary objective of § 510 was to prohibit employers from terminating employees just prior to vesting in their pension, 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4872, it is also clear that this was not the only discriminatory act Congress desired to prohibit. Congress wanted to protect employees against the panoply of actions an employer could take to discriminate against an employee including making work life so uncomfortable to amount to a constructive discharge, 119 Cong. Rec. 30374, *reprinted in* SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT SECURITY ACT OF 1974, Pub. L. No. 93-406 (Comm. Print 1976) at 1775-76 (statement of Sen. Hartke), as well as to protect rights other than vested benefits. 120 Cong. Rec. S. 15,737 (Aug. 22, 1974) (statement of Sen. Williams), *supra.*

## CONCLUSION

The plain language of § 510 of ERISA, the relationship of § 510 to ERISA's structure, and ERISA's legislative history all lead to the conclusion that ERISA § 510 protects against an employer's interference with the attainment of rights under an employee welfare benefit welfare plan. For the foregoing reasons, AARP and NELA urge the Court to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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